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FILED
MAR 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1019

JOHN KENT SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on February 26, 1965.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and appears at p. 1a of the Appendix hereto.

JURISDICTION

The opinion judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was dated and entered on February 26, 1965.

The jurisdiction of this Court is invoked pursuant to Section 1254(1), Title 28, of the United States Code.

QUESTIONS PRESENTED

1. Did the Court, in upholding the government's witness and co-defendant's claim, of privilege against self-incrimination under the Fifth Amendment of the Constitution, deprive the Petitioner of his right to confrontation, cross-examination and fair trial under the Sixth Amendment of the Constitution?

2. Did the Court deprive the Petitioner of a fair trial in refusing to permit counsel to impeach by cross-examination the government's witness and co-defendant, in regard to a prior written inconsistent statement, because the statement had been suppressed in a prior hearing for use against the witness?

STATEMENT OF THE CASE

The Petitioner was charged in a six count indictment with Conspiracy, Bank Robbery and Interstate transportation of a stolen automobile under Title 18, Sections 371, 2113 and 2312 United States Code. After a trial, which consumed five trial days, the Petitioner was convicted by a jury on two counts of an indictment under Title 18 of the United States Code, Section 2313, charging him with bank robbery and one count under Title 18, Section 2312, charging interstate transportation of a stolen automobile. The appeal was from certain rulings made by the District Court who refused to require two co-defendants-witnesses to answer questions asked on behalf of the Petitioner by counsel.

In the early afternoon of July 8, 1963 the Citizens Bank of Maryland, Eastover Branch, located in Oxon Hill, Maryland, was robbed at gunpoint by four persons, who took approximately $131,000.00 in cash. The FBI arrested ten persons, including the Petitioner, charging them with

participating, in one form or another, in the robbery of the said bank. The persons arrested were charged with conspiracy to rob the aforementioned bank. Each of the ten defendants, including Petitioner, were in addition, charged with four counts of bank robbery and six of the ten defendants, including the Petitioner, were charged, in addition to the other charges, with interstate transportation of a stolen motor vehicle. The automobile was used in the commission of the crime.

All defendants, except the Petitioner, entered pleas of guilty to one or more counts of the aforementioned indictment. Five of the ten defendants were under indictment for bank robbery in Brooklyn, New York and under Rule 20 of the Federal Rules of Criminal Procedure had the New York indictment transferred to the District of Maryland and entered pleas for that robbery. The robbery of the bank in New York took place in December, 1962.

Prior to trial and pursuant to a Bill of Particulars filed by the Petitioner, the government informed him that he was being charged as an aider and abettor and not as an actual participant in the aforementioned Oxon Hill robbery.

Trial began for Petitioner on May 12, 1964 and consumed five trial days. On May 20, 1964 the jury, after deliberating for approximately nine hours, returned a verdict of guilty on Counts Two, Three and Six of the said indictment. Counts Two and Three were the lesser bank robbery counts and Count Six charged interstate transportation of a stolen motor vehicle.

The government's case against the Petitioner consisted entirely of the testimony of four co-defendants, who according to their testimony voluntarily consented to become witnesses for the government. These witnesses — co-defendants were Warren Simms, Roger John Ugaro, Andrew

Chappell, Jr. and Harry Goody, Jr. No other testimony was offered which related in any way to the Petitioner, all of the remaining testimony dealt with proof of a bank robbery, which the government concedes the Petitioner did not participate in, and evidence relating to theft and recovery of cars used in the robbery. No physical evidence whatsoever was offered against the Petitioner, except photographs of the outside of his apartment.

Each of the witnesses co-defendants related in their testimony their acquaintance with the Petitioner and with each other, both in the Oxon Hill robbery and other ventures. Warren Simms testified that all but five of the co-defendants participated in a prior robbery. By inference he included the witness co-defendant Chappell (App. 5).* He also related to the Court prior knowledge of Chappell's criminal activities relating to theft of automobile (App. 3). On cross examination counsel for the Petitioner questioned Chappell as to whether or not he had been engaged in other criminal activities with the witness co-defendant Simms, Chappell declined to answer over the objection of counsel, asserting his Fifth Amendment privilege against self-incrimination (App. 6). The court, although ruling that counsel for the Petitioner had a right to question the witness in this area, advised Chappell that he also had a right to refuse to answer if he so desired (App. 9). The witness Chappell then refused to answer this question again asserting his Fifth Amendment privilege (App. 10).

During the course of recross examination by the government of the witness co-defendant Harry Goody, Jr., he testified that he had not talked to anyone at anytime about the Petitioner until approximately one week before trial.

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*Appendix references are to the Appendix in the Petitioner's Appendix below.

stating further that he had refused to talk about the Petitioner (App. 35). Counsel for the Petitioner then asked Goody about a signed statement given to the FBI by him on October 14, 1963, a copy of said statement having been furnished counsel for the Petitioner by the Government (App. 19, 35). The witness indicated that this statement he thought, had been suppressed by the court. The evidence further shows that apparently a hearing has been held in regard to the suppression of the aforementioned statement and the court had ruled that the statement be suppressed because of the illegality of Goody's arrest, which statement, apparently, the court found was the fruit of this arrest. The court based its ruling on the Supreme Court Opinion of *Miller v. U.S.*, 357 U.S. 301 (1958). The court further indicated that the clerk had been informed not to publish the opinion which ruled that the statement should be suppressed for the reason that the court apparently desired to withhold knowledge of this fact from other co-defendants until after all of the defendants had been tried or entered pleas. Counsel for the Petitioner learned for the first time at trial that said statement of Goody had been suppressed (App. 40).

The Court heard lengthy arguments from both the government and counsel for the Petitioner on the question of whether or not said statement, even though suppressed, could be used to impeach the witness Goody. The government and counsel for the Petitioner both argued that the statement could be used. The court, however, over objection of counsel ruled that inquiry of the witness Goody [illegible] use of the aforementioned statement was not proper, [illegible]ding that once evidence is suppressed by the court, that this evidence cannot be used by anyone at anytime in any proceeding (App. 43). Counsel for Petitioner excepted to this ruling.

The Petitioner did not take the stand nor did he offer any evidence on his behalf.

The case as presented to the jury rested entirely on the credibility of four co-defendants who were witnesses for the government. After approximately nine hours of deliberation the jury returned a divided verdict as heretofore stated.

FEDERAL JURISDICTION

Federal jurisdiction is based on the fact that this is a criminal action instituted by the United States upon an Indictment charging the Petitioner with violation of the laws of the United States dealing with robbery of banks, whose deposits are insured by an agency of the United States and interstate transportation of stolen motor vehicles contained in Title 18, Sections 2113 and 2312.

REASONS FOR ALLOWANCE OF THE WRIT

1. The District Court erred in allowing the witness Chappell to assert his Fifth Amendment privilege and in failing to strike the witness' testimony.

On the first question presented the Court of Appeals virtually disregarded the ruling of the District Court, which held, that pursuant to the case of *Alford v. U.S.* 282 U.S. 687, counsel could properly inquire into the area of prior criminal association between witnesses and other parties to the action. In effect the court ruled in favor of the Petitioner so far as the asking of the question and then on the other hand allow the witness to assert his constitutional privilege against self-incrimination. The Court thus ruled against the very inquiry that it previously held proper. It is suggested that the Court allowed the Petitioner his constitutional right to cross examine in one breath and then took it away in another. One of the ques-

tions this Court should answer is which of the constitutional guarantees will prevail, those of the witnesses under the Fifth Amendment or the Petitioner's rights under the Sixth Amendment, or both.

In answering this question, it is suggested that consideation be given to the fact, first, that the court permitted all of the witnesses-co-defendants to testify freely and fully as to their association with each other and with the Petitioner. A witness, co-defendant Simms had involved he and Chappell in another bank robbery which had taken place only a few months prior to the one in question. Second, that the witnesses were called by the government for the purpose of soliciting information to be used in convicting the Petitioner for the crimes which the witnesses had already entered guilty pleas. Each of the witnesses, including Chappell, testified under oath and before the jury that they had voluntarily appeared to testify for the government without any promises or reward from the government or the Court. Third, that the only evidence against the Petitioner of any kind was the testimony of the four co-defendants, including Chappell. Their testimony must, of necessity, be closely scrutinized by the the jury and for this reason great latitude is given in regard to cross examination, particularly as to prior criminal associations with each other. *Alford v. U. S. supra.* This is important when you consider that the Petitioner was charged as co-conspirator and an aider and abettor and not as an actual participant in the crime. One of the questions for the jury was whether or not he was in fact, a co-conspirator and an aider and abettor and it is suggested that prior association among the witnesses is very important and goes right to the heart of this question.

It was suggested by the Court of Appeals that Simms and Chappell both had virtually destroyed portions of

their testimony by what they testified to before the jury. We contend that this makes little or no difference under the circumstances, for the jury is entitled to hear fully the testimony of every witness regardless of what other witnesses might or might not have said. Inconsistencies between witnesses is an important factor in determining truthfulness of a witness.

The Court of Appeals recognized that the Fifth Amendment privilege is not an absolute one, as is relied on *Smith v. U. S.*, 331 F. 2d 265, 8th Cir. (1964) and *U. S. v. Cardillo*, 316 F. 2d 606, 2nd Cir., cert denied, 375 U.S. 822 (1963). In those cases the courts held that where the inquiry would harm the defendant or prevent him from fully developing his case, the privilege against self-incrimination would not be upheld and if the witness insist on asserting his constitutional rights, then possibly his entire testimony would be stricken from the record. In this case no such thing was done as Chapell's entire testimony was considered by the jury in spite of the fact that the Court permitted him to assert his right against self-incrimination. We contend that the question asked the witness was a valid one which we have heretofore pointed out went directly to the heart of the charge for which the Petitioner was standing trial. It should also be pointed out that a large number of co-conspirators and witnesses, some of whom testified and some who did not, had participated on prior occasions in bank robbery which makes this question even more important in considering who was or was not a co-conspirator or an aider or abettor.

Finally if the District Court under the circumstances felt the witness should not answer the question, then the Court should have removed all of the witness' testimony from consideration by the jury and advised the witness that he would not have to testify at all if he felt he would

be injured by doing so. The witness then could protect himself by refusing to testify at all. It is finally pointed out again that the witness was called by the government who was aware of the pending indictment against him in New York that to permit the government to use such a witness and then at a crucial point in his testimony insist that he should not tell all the facts to the jury is unfair to the Petitioner and violates his right to have a fair trial.

2. The District Court erred in refusing to permit counsel for the Petitioner to cross-examine the witness Goody on a prior inconsistent statement under the facts of this case.

The second question the Court of Appeals was called upon to decide was whether or not the District Court erred in refusing to allow cross examination of another witness-co-defendant in regard to a statement made by him inconsistent with his testimony at trial. It is first pointed out that the Court of Appeals found as a fact that the witness' statement would have refuted his testimony and that the District Court could not refuse cross examination merely because this statement had been suppressed. In spite of this ruling, the Court held that since it would not refute the substance of the witness' testimony the Court was correct in refusing cross examination. Petitioner points out that this appears to be mere double talk and that under no circumstances can the Court equate what would or would not be inconsistent. That this is the function of the jury and that the Court should have permitted cross examination on the statement and let the jury decide whether or not this inconsistency was of such a nature that it would cause them to disbelieve his testimony in its entirety or in part. It is to be remembered, that this is not the testimony of a mere witness, but a co-defendant

who is a witness on behalf of the government. Nor is this the testimony of an inconsistency as it deals with two witnesses other than the co-defendants, but of an inconsistency between the same witnesses. The Court of Appeals disregarded the lower Court's reason for refusing to permit cross examination on the statement. The clear unquestioned reason of the lower Court in its refusal of cross examination, was because the prior statement had been suppressed at an earlier hearing and I might add had been suppressed not only for use against the witness, but was kept a secret from all other co-defendants until after or at the time of their trials. The Court of Appeals appeared to have adopted a discussion the Court had with counsel as to some of the inherent dangers of suppressed statements but as the Petitioner pointed out to the Court of Appeals the question of inaccuracy of a statement is not at issue here, the only question is whether or not an inconsistent statement was, in fact, made, whether it be true or false. It should also be pointed out that at the trial before the District Court the government asserted the same position as your Petitioner in that counsel should be permitted to cross examine on the statement, the Court however, ruled against both the Petitioner and the government.

On the question of use of suppressed evidence the law is clear. This Court in *Walder v. U. S.*, 317 U.S. 62, 74 Sup. Ct. 354 made this point very clear. There appear to be no qualifications in the use of such statements, except that the Court must find the statement to be inconsistent. *Gruenwald v. U. S.*, 353 U.S. 392, p. 418, 77 Sup. Ct. 963; Vol. 3, Wigmore on Evidence, Section 140. On this point both, the District Court and the Court of Appeals, found that the statement was inconsistent. This Court has not set aside or amended *Walder v. U. S.*, *supra* in any way up to the present time. See also *Lassoff v. Gray*, U.S. Dis. Ct.,

Ky., 207 F. Supp. 843 (1962); *Jackson v. U. S.*, 311 F. 2d 689; *White v. U. S.*, 317 F. 2d 233; *U. S. v. Beno*, 324 F. 2d 582; *Smith v. U. S.*, 324 U.S. 879; *Bailey v. U. S.*, 328 F. 2d 546 (1964).

It is interesting to note that no cases have been found or cited to date by the government, Petitioner or the Court which deals directly with a prior inconsistent statement by a witness which had been suppressed. However, there appears to be more reason for permitting the use of a statement against a witness, as he is not protected as a defendant who might or might not be defending himself against evidence presented by the government. A witness' sole function is to give testimony to aid the government in convicting a defendant. The Courts have consistently held that the function of a witness is to give truthful testimony and where it is clear that such testimony is not given then the defendant has the right to show to the jury the untruthfulness of the witness' testimony. This question might be one of first impression and is important enough for this Court to grant certiorari.

On the second question there also appears a conflict between constitutional rights as between a witness and defendant. In this case the Fourth and Sixth Amendments. The Fourth as to the witness, the Sixth as to the Petitioner. Another factor to be considered is that the reason for upholding the witness' Fourth Amendment guarantee appear to have been removed. The witness had already entered guilty pleas as to all indictments against him, unlike Chappell, the prior witness, who still had an indictment outstanding and we contend that the reason for the exclusionary rule as to Goody had been removed. And also because he, in fact, removed the necessity of the rule himself by appearing as a witness on behalf of the government

voluntarily as he so testified. See *Ullman v. U. S.*, 350 U.S., 425, 439, 76 Sup. Ct. 497.

Finally, that a reading of the portion at trial testimony which the Court of Appeals included in its Opinion clearly indicated that the witness was apparently aware of his prior statement and that he had made inconsistent statement at trial, as he was the one who indicated that the statement had been suppressed when asked by counsel for the Petitioner a question in regard to that statement. The Court of Appeals we submit in its Opinion failed completely to consider that the Petitioner's right to cross examine and to solicit the truth is always paramount to the government's convenience, and when the Court in deciding the second question held that the Court was correct in its ruling, because if counsel was permitted proper cross examination, that it would create an added burden on the government in proving its case, erred and denied the Petitioner his right to a fair trial.

CONCLUSION

For the aforestated reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES P. HOWARD, JR.,
JOHN R. HARGROVE,
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9545.

United States of America,

Appellee,

versus

John Kent Smith,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
HARRISON L. WINTER, DISTRICT JUDGE.

(Argued January 4, 1965. Decided February 26, 1965.)

Before HAYNSWORTH, Chief Judge, J. SPENCER BELL, Circuit Judge, and HUTCHESON, District Judge.

J. SPENCER BELL, Circuit Judge:

The defendant was convicted of aiding and abetting a Maryland bank robbery and a violation of the Dyer Act. The Government's contention was that the defendant participated in the theft of two cars in Washington, D.C., which he knew were to be used and which were used in the robbery and in transporting the robbers to and from Washington.

The defendant contends that the court committed two errors during his trial. The first was in permitting the

witness Chappell to plead the Fifth Amendment, and the second was in limiting the cross-examination of the witness Goody.

On July 8, 1963, a branch of the Citizens Bank of Maryland at Oxon Hill was robbed at gunpoint by four persons of over $130,000.00. Eleven persons were indicted and charged with participating in one way or another in the robbery. The Government's case against the defendant consisted entirely of the testimony of four of his codefendants who had previously pleaded guilty to one or more of the six counts of the indictment. These witnesses were Sims, Ugaro, Chappell, and Goody. The other testimony did not directly implicate the defendant, since it dealt with proof of the robbery. The Government concedes that the defendant was not present when the bank was robbed. There was also evidence of the loss and recovery of the stolen cars. Sims, who organized this robbery, was the accepted leader of a gang of bank robbers located in the New York-New Jersey area to which the other three witnesses belonged. All four had participated in other bank robberies in that area at various times prior to the one with which we are presently concerned.

On two occasions, June 24 and July 1, the group came from New York to Washington, where they made contact with local confederates[1] for the purpose of committing the robbery, but for various reasons they were frustrated until the successful attempt on July 8, 1963. The witness Sims took the stand and testified in detail to all the facts surrounding the crime. He testified that in the two frustrated attempts he had arranged for Chappell to come with them from New York and steal the desired cars in the Washington area. He testified that in making the preliminary arrangements, he had not gone into details with Chappell, who was a "specialist" in this field, because Chappell had worked with him before and could be relied on to do the job satisfactorily.

[1] The evidence indicates that it was not until after the June 24 activities that the group, acting through Chappell, made any contact with the defendant.

Chappell then took the stand and generally confirmed Sims' testimony concerning the facts related to the robbery involved in this case. He testified that he had met the defendant Smith on prior visits to Washington and that he knew that Smith was in the business of "repossessing" automobiles and had a set of master keys which would unlock any General Motors car. He stated that on the second unsuccessful effort to rob the bank, he had borrowed Smith's keys in order to get the required vehicles and that Smith knew that the keys would be used to steal cars. He testified that after the second thwarted attempt, he became apprehensive and declined to participate further in the Maryland robbery, but before he did so, he arranged for the defendant Smith to take over for him and obtain the needed cars. He admitted that he had pleaded guilty to a charge of conspiracy to commit this bank robbery and that he was on probation because of a conviction for possessing counterfeit money.[2] On cross-examination Chappell was asked whether he had engaged in any other crimes with his codefendant Sims. After a conference at the bench, the court permitted Chappell to plead the Fifth Amendment to this question. It is this action on the court's part that the appellant contends was error.

We find no error. The witness Chappell was under indictment with Sims for bank robbery in New York, and certainly there is no question of his right to plead the Fifth Amendment. Nor is there any substance to the appellant's contention that Sims' testimony, which seriously implicated Chappell, removed the cloak of the Amendment's protection from Chappell. At most Smith was entitled to have Chappell's direct testimony implicating him expunged from the record if the Fifth Amendment plea in any way seriously hampered or embarrassed the defendant's effort to get at the truth of the facts in this case by his cross-examination of Chappell. *Smith v. United States*, 331 F. 2d 265, 277-78 (8 Cir. 1964); *United States v. Cardillo*, 316 F. 2d 606, 611 (2 Cir.), *cert. denied*, 375 U.S. 822 (1963). We

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[2] Chappell was also under indictment for a robbery of the Bensonhurst National Bank in Brooklyn, New York on December 31, 1962.

need not go so far as *Cardillo* to say that if the question affected only the credibility of the witness, the refusal to answer would not entitle the defendant to have the witness' testimony stricken. Here we think it obvious beyond any possibility of a doubt that Chappell's character had been placed in such a light by his own prior testimony and by that of Sims that his plea of the Fifth Amendment could have had no other effect on the jury than to confirm the opinion created by his and Sims' prior testimony. Under these circumstances, it is equally obvious that Chappel's refusal to answer could not have embarrassed the defendant's efforts to elicit the full facts about the instant case.

We turn then to the second point raised by the defendant. When the robbers arrived in Washington in preparation for their third attempt, as a result of Chappell's previous arrangements they went directly to the defendant's apartment, where they stayed during the weekend before the robbery. During the early hours of the morning of July 8, the defendant drove Goody and another member of the gang, both of whom were narcotics users, around the city in search of narcotics. Goody testified that it was during this ride that the defendant learned from the conversation that the robbery was to take place in Maryland. Upon their return to the defendant's apartment, a careful rehearsal of the crime was carried out in the defendant's presence. The three witnesses — Sims, Ugaro, and Goody — identified the defendant in the courtroom and testified to his presence at this rehearsal.

On direct examination Goody, who had joined the gang only on the last attempt and for whom principally the rehearsal in the defendant's apartment was put on, testified that he too first learned that the bank to be robbed was situated in Maryland on the automobile ride with the defendant early on the morning of the day of the robbery. On cross-examination defense counsel attempted to impeach Goody's testimony that the defendant had learned of the interstate character of their activities on the morning ride by showing that in a statement he had given in April, 1963, he had told the F.B.I. that he could not say specifically

that Smith knew that the offense was to be committed in Maryland. Goody testified that he was not sure whether or not he had told the F.B.I. of Smith's knowledge of the locus of the crime. On re-direct it was shown that Goody had given the information about the incident in the car to co-counsel for the Government about a week before the trial. On re-cross, Goody was asked why he had not mentioned the incident before, and the court pointed out that on his cross-examination the witness had said he could not remember whether he had or not. He was then asked if he had been questioned about the defendant prior to the April disclosure, and he conceded that he had. At this point in the re-cross, the following exchange occurred:

> "Q. And you didn't tell anyone of the persons who questioned you about this incident in the car? A. I refused to talk about Mr. Smith at any other time.
>
> "Q. You say you did refuse to talk about Mr. Smith? A. At any other time.
>
> "Q. Is that correct? You are positive of that? A. Yes.
>
> "Q. You didn't talk to him the first time you were arrested about Mr. Smith? A. I believe that statement was suppressed, wasn't it, Your Honor?"

The statement to which the question referred had been given by Goody in October, 1963, at the time of his arrest. It had been suppressed because of the illegality of the arrest. Goody had also contended that the statement had been coerced by an offer of narcotics to alleviate withdrawal symptoms from which he was suffering, but the court had not found it necessary to pass on this point.

The court refused to allow defendant's counsel to cross-examine on the statement. This refusal is defendant's basis for his second contention of error. An examination of the statement itself shows that in very general language and without giving details, it admitted Goody's part in the robbery and named the defendant Smith as one of the participants. While we have some doubt that the court

would have been justified in denying the defendant the right to cross-examine on the basis of this statement solely because it had been suppressed, we think the court was clearly justified in declining in the exercise of its discretion to allow the cross-examination to proceed further along this line. While it is true that the statement would literally have refuted Goody's testimony that he had "refused to talk about the defendant Smith," it in no realistic sense refuted the substance of the witness' contention that he had not at any previous time told anyone that the defendant Smith knew the locale of the robbery. Furthermore, Goody, prior to this question, had admitted on cross-examination that he had talked about Smith on occasion before his statement to Government counsel just a week before the trial. The trial court pointed out that the conflict was relatively unimportant with respect to Goody's credibility because he had both (1) admitted that he might have discussed Smith's implication and (2) conceded that he did not with certainty remember whether he had mentioned the automobile ride or not. The court also pointed out that to permit the use of the suppressed statement for this purpose would require permission to the Government to re-establish Goody's credibility by showing the circumstances surrounding the October statement and that to do so would take the inquiry too far afield. We think the court was within its discretion in thus limiting the cross-examination. *Cf. Chinn v. United States*, 228 F. 2d 151, 154 (4 Cir. 1955).

There being no error, the judgment of the district court is

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1019

JOHN KENT SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–6) has not yet been reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1965. The petition for a writ of certiorari was filed on March 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge abused his discretion to regulate the scope of cross-examination as to collateral matters on two occasions during the trial.

[1] The opinion of the district court suppressing the witness Goody's post-arrest statement is reported *sub nom. United States* v. *Sims*, 231 F. Supp. 251.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the District of Maryland of aiding and abetting a bank robbery and of transporting stolen cars in interstate commerce. He was sentenced to serve a total of fifteen years imprisonment (P.A. 1).[2] The court of appeals unanimously affirmed the conviction (Pet. App. 1–6).

The evidence against petitioner consisted entirely of the testimony of four co-defendants who had pleaded guilty. It showed that petitioner participated in robbing a bank in Oxon Hill, Maryland, of over $130,000. Although not actually present during the robbery, petitioner furnished to the robbers, an organized group from New York, stolen automobiles, lodging, and other assistance (Pet. App. 2–4).[3]

The trial lasted five days. During its course, Warren Sims, the leader of the group of robbers (Pet. App. 2), testified in response to a question by the government that he had used co-defendant Andrew Chappell, but never petitioner, in other bank robberies (P.A. 5). Subsequently, Chappell testified for the government. Petitioner's counsel asked him during cross-examination about his criminal record, and

[2] "P.A." refers to petitioner's appendix and "G.A." to the government's appendix in the court below.

[3] These background facts do not appear in the record on file at the Court, which contains only those excerpts from the trial transcript that bear directly on the two evidentiary rulings challenged on appeal. Since petitioner does not challenge the sufficiency of the evidence, we have based this portion of our Statement on the summary of the facts appearing in the opinion below.

Chappell replied that it consisted of a single conviction for counterfeiting. Counsel then asked Chappell whether he had participated in other crimes with Sims. Chappell refused to answer. After being advised of his rights, Chappell claimed the privilege against self-incrimination, and the court sustained his claim (P.A. 6–10).

Another co-defendant, Harry Goody, said in the course of lengthy testimony for the government that at about 4:30 a.m. on the morning of the robbery he heard, during a conversation in a car between petitioner and co-defendant Roland Ghee, that the bank to be robbed was in Maryland (P.A. 15–16). On cross-examination, Goody said that he might have told F.B.I. agents in April, 1964, that he could not say definitely that petitioner knew the location of the bank. Goody acknowledged that he might not have told the government about petitioner's conversation in the car until about one week before the trial (P.A. 25–27, 30–33).

On recross examination, the following occurred (P.A. 35):

> Q. And you didn't tell any one of the persons who questioned you about this incident in the car?
>
> A. I refused to talk about Mr. Smith at any other time.
>
> Q. You say you did refuse to talk about Mr. Smith?
>
> MR. KERNAN. At any other time.
>
> A. At any other time.
>
> Q. Is that correct? You're positive of that?
>
> A. Yes.

Q. You didn't talk to him the first time you were arrested about Mr. Smith?

A. I believe that statement was suppressed, wasn't it, Your Honor.

Q. I can ask you about it.

The statement to which defense counsel[4] and Goody referred was a confession given on October 14, 1963, which the judge presiding at the trial had previously suppressed under the authority of *Miller* v. *United States*, 357 U.S. 301, and *Wong Sun* v. *United States*, 371 U.S. 471 (P.A. 40; G.A. 2–3; and see the opinion suppressing the statement, *United States* v. *Sims*, 231 F. Supp. 251). Goody's sole references to petitioner in this confession were that he stayed in petitioner's apartment and that petitioner was there (G.A. 2–3). Out of the hearing of the jury, petitioner's counsel explained that his purpose was to show that Goody "did in fact make a statement, which indicated that he said something about John Kent Smith, because his testimony was that prior to this, he declined to talk about Mr. Smith, in so many words" (P.A. 37). After hearing argument from defense and government counsel with regard to whether Goody could invoke the exclusionary rule against petitioner (P.A. 35–42), the court disallowed the question for the reasons (1) that the voluntariness of a confession induced by an illegal arrest is suspect, and (2) that if petitioner were allowed to cross-examine on the confession, the government would be entitled to show the illegality of the arrest and other underlying circum-

[4] At the time, counsel had the statement in his possession, having received it earlier pursuant to the Jencks Act (P.A. 19–20).

stances, which "leads us to an awful lot of collateral issues * * * which are not germane to this type of case and which become quite confusing to a jury" (P.A. 42–43).

ARGUMENT

In refusing to strike Chappell's entire testimony because of his claim of the privilege against self-incrimination and in refusing to require the witness Goody to answer whether he had referred to petitioner in a statement given after an illegal arrest, the trial judge acted well within his discretionary power to regulate the scope of cross-examination. *E.g.*, *Alford* v. *United States*, 282 U.S. 687, 694. Both questions were minor incidents relating to collateral matters in a five-day trial, during which defense counsel cross-examined each witness extensively.

1. In asking Chappell in cross-examination to testify about previous crimes of which he had not been convicted, defense counsel was asking the witness to incriminate himself.[3] Although Chappell's prior crimes related to his credibility, it was, as the court of appeals pointed out (Pet. App. 4), "obvious beyond any possibility of a doubt that Chappell's character had been placed in such a light by his own prior testimony and by that of Sims that his plea of the Fifth Amendment could have no other effect on the jury than to confirm the opinion created by his and Sims' prior testimony." Thus, the evidence sought was both cumulative (since Sims had already testified to

[3] There is no question but that Chappell's claim of privilege was valid; in fact, at the time he was under indictment in New York for a different bank robbery (Pet. App. 3).

committing other crimes with Chappell) and collateral (since prior criminal associations between Sims and Chappell had no direct bearing on their testimony linking petitioner to the crime then being tried). In addition, under established rules of evidence, there was no right to cross-examine the witness on prior criminal conduct not resulting in conviction, *e.g.*, 3 Wigmore, *Evidence*, §§ 983, 987 (3d ed. 1940); McCormick, *Evidence*, § 42 (1954). In these circumstances, the trial judge clearly had discretion to refuse to strike Chappell's entire testimony because of his valid claim of privilege. On facts almost identical to those in this case, the Court of Appeals for the Second Circuit recognized that although invocation of the privilege on cross-examination may, in appropriate circumstances, call for striking the witness's testimony on direct, invocation of the privilege did not require that a witness's testimony be stricken when the questions asked him "were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination." *United States* v. *Cardillo*, 316 F. 2d 606, 611, certiorari denied, 375 U.S. 822.

2. Similarly, the refusal to allow further questions about Goody's post-arrest confession was a reasonable exercise of discretion. Again, the proposed cross-examination would have related solely to Goody's credibility by showing that he lied when he said on the stand that he had not discussed petitioner with federal agents prior to one week before trial. Defense counsel, however, had already examined Goody about his references to petitioner in an April, 1964, statement made more

than one week before trial. Petitioner therefore did not need the October post-arrest confession, which contained only a fleeting mention of petitioner, to show the inconsistency. Moreover, the inconsistency was entirely collateral to the issues in the case and the proposed inquiry would have raised further collateral issues by putting in issue the question whether the post-arrest confession was voluntary or had been induced by illegal police conduct, duress, or an implied promise of heroin.[6] In these circumstances, the trial judge did not abuse his discretion in limiting the cross-examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1965.

[6] These were the grounds on which the confession was sought to be suppressed. See *United States* v. *Sims*, 231 F. Supp. 251. Since the trial judge had presided at the suppression hearing, he was well aware that these claims might be made.

U.S. GOVERNMENT PRINTING OFFICE : 1965